

The General Principle of non Discrimination and Equal Treatment in the Legislation and Jurisprudence of the Court of Justice of the European Union

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Abstract: The principle of *non discrimination* and the principle of *equal treatment* are today regulated by most of the national law systems, including the administrative documents. The principle of equal treatment enjoys maybe the longest period of regulation as it was inserted two centuries ago in a document of essential value for humanity, namely the *Declaration of fundamental human and citizen rights* in 1789. At the level of the EU, the *equal treatment* and *non discrimination* have the value of fundamental rights of the citizen, while within the *European Code of Good Administrative Conduct* they have the value of *principles of administrative law*. The consequence of non compliance with these principles is regulated in the *Charter of fundamental rights of the European Union*, according to which any discrimination based on certain criteria is *unjustified*, with exceptions when unequal treatments can be accepted for grounded situations. From this point of view, in the activity of the authorities of the public administration but also in the jurisdictional activity, the *principle of non discrimination and equal treatment* has been analysed from the perspective of other principles, such as the legality, proportionality, transparency and equivalence. This study focuses on the analysis of the forms of discrimination underlined by the legislation of the EU, being then underlined in the jurisprudence of the EU and mainly of the focus of the influence of the other principles on the *non discrimination and equal treatment* principles.

Keywords: general principles; administrative law; European Union; Court of Justice of the European Union

1. Introduction

The general principle of non discrimination and equal treatment within the legislation of the European Union. The Court recognized *the principle of non discrimination* in its jurisprudence quite soon, in the context of the CECA Treaty without making a difference between the term *equality* and *non discrimination*, as being synonyms. Even if the two principles are regulated in the content of distinct articles within primary or derivate acts, the principle of equality and non discrimination „are in general perceived as being the non dissociable faces of the

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same principle”. Still, the principle of equality has more of an economic content rather than an ideological content and its character is instrumental (Iliopoulou, 2007).

The EU Charter of fundamental rights *regulates equality in front of the law* in the content of article 20, while *non discrimination* is mentioned in the following article. According to the charter, it is forbidden the discrimination of any type, which is grounded on any of the criteria involving *sex, race, colour, ethnicity, social origin, genetic characteristics, language, religion or convictions, political opinions or of any other nature, membership to a national minority, fortune, birth or a handicap, age or sexual orientation*.

In article 18 in the TFEU it is indicated that in the scope of the treaties it is *forbidden to exert any discrimination on grounds of citizenship or nationality*. According to article 3 in the TEU, the Union disproves social exclusion and discriminations, promoting justice and social protection, equality between men and women, solidarity among generations and protection of the children rights. Protocol no.26 on the services of general interest, annexed to the *Treaty on the European Union* and *Treaty of the functioning of the European Union* establishes in article 1 the fact that the common values of the Union in what concerns the services of economic general interest include in particular *the equal treatment* and promotion of the universal access and rights of the users.

On June 29th, 2000, the Council adopts *Directive 2000/43/EC on the respect of the principle of equality between individuals irrespective of race or ethnical origin*, which guarantees protection against discrimination in labour and working conditions.

Directive 2000/78/EC on November 2000- equal treatment on employment and labour force establishes the general frame for fighting discrimination on grounds of religious affiliation or convictions, handicap, age or sexual orientation in employment or labour force, respectively for the application, in the member states, of the principle of equal treatment. In the virtue of the Directive, *the equal treatment* entails the absence of *any direct or indirect discrimination*, on the grounds on one of the motives mentioned above its applicability not being limited only to the private sector but also in the public sector.

Paragraph 2 in *Directive 2000/78/EC on November 2000* defines the concept of *direct discrimination* as being the situation in which an individual is treated “in a manner that is less favourable than it is, an individual was or will be treated in a similar situation” related to one or more of the values listed above; while *indirect discrimination* is performed in the context in which “a disposition, a criteria or a practice apparently neutral can have as consequence a special disadvantage for people of a certain religion or with certain convictions, with a handicap, or a

certain age or of a certain sexual orientation, in relation to another person” with some exceptions.¹

Also, the *recruitment procedure* for the European public servants is performed with the respect of the *principles of equal treatment and non discrimination* namely the *exclusion of any discrimination* based on sex, race, colour, ethnicity or social origin, genetic features, language, religion or convictions, political opinions or any other nature of opinions, national minority, wealth, birth, handicap, age or sexual orientation, respectively according to principles of *complete equality between men and women* (article 1, paragraph 1 in the EU Statute of the public servants).

2. The Interaction of the Two Principles with other Principles Defined in the Legislation and Jurisprudence of the Court of Justice of the European Union

Regarding the role and the importance that the principle of equal treatment has within the European judicial order, in Maruko case² the general attorney Ruiz Jarabo underlined a significantly relevant aspect. Offering it the same importance as the principle of free circulation, he considers it as being the most traditional and ingrained principle in the European judicial order, enjoying, together with its regulation in the text of the Treaty, of a sustained extension and support and surpassing any limitation to one of the criteria and values it protects.

Directive 2000/ 43/EC offers the justification of the reason for which *the principles of subsidiarity and proportionality* have to be applied in order to reach the objectives related to this sector. To this end, the criteria related to the dimension and impact of the actions proposed was taken into consideration. The union has the ability to reach a high level of protection against discrimination at the level of all the member states, ensuring therefore a certain convergence of the non discrimination policies.

Also, *the principle of non discrimination interacts with the principle of proportionality in ensuring reasonable and equitable results*. Through proportionality, as indicated in the normative content of the Directive, *the principle of legality* “tries to accomplish a treatment that is adapted in sufficient way to the

¹ As indicated in the Directive, the exceptions regard the situation in which that disposition, criteria or practice is objectively justified by a legitimate objective and the means to reach this objective are not adequate and necessary as well as in the cases of the individuals with a certain handicap or any other organization under the incidence of the present directive has the obligation, in the virtue of the national legislation, to take adequate measures to set up a space adequate for the persons with handicap, with the purpose to eliminate the disadvantages resulting from this disposition or practice.

² CJEU, Decision on April 1st, 2008, *Tadao Maruko/Versorgungsanstalt der deutschen Bühnen*, C-267/906, Rec., p.I-1780, p. 83

particularities of the facts. Therefore, the general rule of law is adapted in order to obtain *reasonable and equitable results*”.

At the level of the institutions of the Union, these principles are valued in the same manner, in the direction of obtaining *reasonable and equitable results* which impose the performance of *reasonable arrangements*¹. They are valued according to criteria of *objectivity and reasonability*, the employer having the obligation to motivate, in compliance with the principle of non discrimination and the principle of proportionality, any limitation² in applying these principles. For example, in the *Cause Feryn*³ the Court admitted the fact that there is a case of direct discrimination in employment in the virtue of Article 2, paragraph 2a) in the Directive 2000/43/EC of the Council, when an employer publicly states that he will not hire employees of a certain racial or ethnic origin, because by such statements certain candidates are discouraged to apply and determines as such an impediment for the access on the labour market. *These declarations made in the course of the recruitment policy are sufficient to presume the existence of direct discriminatory policies. The task of the probation*, in case in which a person claims the breach of the principle of equal treatment⁴ by direct or indirect discrimination by the respective institution falls under the responsibility of that institution that has to prove the *negative fact*.

Still, in the jurisprudence of the Court⁵ it has been states that a certain difference in treatment can operate, but only in the cases in which it is justified and the discrimination is grounded on objective reasons (that do not have to be related to citizenship or nationality of the individuals) and is proportional with the purpose followed in legitimate manner by a national state.

¹ By reasonable arrangements have been identified all the measures taken by the institutions of the Union, respectively the administrative operations or administrative acts through which, in compliance with the principle of legality, certain categories of persons can be recruited, promoted, can benefit from professional training, but these measures would not determine *disproportionate obligations for the employer*.

² For example, the *establishment of a mandatory age for retirement and a minimum age for pension for age limit* are a few of the examples of objectives that justify a limitation of these two principles (article 1d, paragraph 6 in the Statute).

³ CJEC, Decision on July 10, 2008, C-54/07, *Feryn*, Rep. 2008-7A, p. I-5213, I-5214

⁴ In order to demonstrate the application of the principle of equal treatment, the employer has to prove the fact that the real employment practice of the company is not responsible for the declarations made. The judge of the sending instance is the competent one to assert if a beach of the principle of equal treatment has been made. In this case, the member states will have to apply sanctions according to the internal law, of such nature that they have to be effective, proportional and discourage discrimination.

⁵ CJEC, Decision on March 15th, 2005, *Bidar*, C- 209/03, Rec, p. I-2119, pct. 54; Decision on September 15th, 2005, *Ioannidis*, C-258/04, Rec., p. I-8275, pct. 29.

In the jurisprudence there have been cases in which the *control of the proportionality* represented at the same time, an instrument for the jurisdictional control of the application of the principle of equality as well as in the control of the principle of non discrimination (Pellissier, 1996). *If we attempt a delimitation of the scope of the two principles, we will notice that while the principle of proportionality establishes a relation or reciprocity between the objectives followed and methods used, the principle of equal treatment is the one that draws attention on the relation existent between different recipients of the measure adopted.* In other words, *the principle of equality has a horizontal effect while the principle of proportionality has a vertical one effect.* (Pellissier, 1996).

To this end, the practice in the matter of the Court of Justice but also the existing jurisprudence at the level of some member states of the EU, have proven that the *principle of non discrimination* is analysed from the perspective of the *principle of proportionality*, respectively from the triple criteria of proportionality. The Court of justice approaches this triple evaluation with regularity. Therefore, in order to exist, the discrimination has to be corresponding, necessary and proportional in strict sense. Using the analysis of this triple criteria that has to be made on stages and not cumulatively, the Court asserts that the “observation of equality becomes more transparent and generates more judicial security”.¹

At national level, according to article 8 in the Directive 2000/78/EC on November 27th, 2000 on the equal treatment on employment and labour market, the member states can adopt or maintain dispositions that are more favourable to the respect of the principle of equality than the ones provisioned in the present directive.

In the matter of awarding public procurement contracts, *the principle of equal treatment, respectively the principle of ensuring equal opportunities for all the tenderers represents basic criteria.* Firstly, the principle of equal treatment implies that the institution awarding the public procurement contract has to prove transparency in order to be able to be verified if the latter has complied with the specific principle or not.² *The principle of equal treatment between tenderers* imposes the development of fair and effective competition between the participants within which the participants are subjected to the same conditions, without any discrimination.³ Therefore, the principle of *transparency* represents only a *corollary of the equal treatment*, namely it imposes the authority that issues the procurement offer to be *clear, precise and specific* in everything related to the

¹ CJCE, Connected Causes C-55/07 and C-56/07, *Michaeler and others*, Rep. 2008-4B, p. I-3147, pct. 37.

² CJEC, Decision on June 18th, 2002, *HI*, C-92/00, Rec., p. I-5553, pct. 45; CJCE, Decision on December 12, 2002, *Universale-Bau and others*, C-470/99, Rec., p. I-11617, pct. 91.

³ CJEC, Decision on April 29, 2004, *Commission/CAS Succhi di Frutta*, C-496/99 P, Rec., p. I-3801, pct. 109-111.

awarding procedure especially in what concerns the participation announcement and the technical specifications.¹ In the administrative practice it has been retained that it can be considered a procedural irregularity the sole fact that a tenderer does not benefit from certain information in comparison to the other participants or benefits from this information with a considerable delay. The Court ruled that it cannot be admitted that a procedural irregularity determine the annulment of a decision to award the procurement contract. Such an action would be admissible if it is proven that in lack of this irregularity, the plaintiff would have has access to information at the beginning of the procedure and the result would have been different, irrespective of how little the chances would have been.²

The principle of equivalence represents the expression of the general principle of *equality and non discrimination*. This implies that the situations comparable cannot be treated in different manner, respectively that fact that the different situations cannot be treated in identical manner exception being the cases in which this treatment is grounded on objective considerations. This principle was frequently and recently restated by the Court of Justice³. We can talk about a breach of the principle of equivalence in the cases in which any individual invoking a right according to the law of the EU is subject to some costs, respectively terms that are longer than the cases in which the latter would invoke a right through a request, according to the internal law.⁴

3. The Principle of non Discrimination and the Principle of Equality at the Level of Some Member States of the European Union

In what concerns the principle of equality and non discrimination in front of the public authorities, it has in view the reason of the administrative authorities to treat in different manner the cases that are identical, respectively in identical manner situations that are different only in the cases in which the law allows that in strongly justified and objective situations this treatment is possible. On the contrary, we are facing a case of discrimination. In the practice of the states, this principle is applied successfully only in Germany, while France offers little importance to the cases in which the ones prejudiced by a discriminatory cause can obtain the recognition of these acts of discrimination and Italy assimilates

¹ CJEC, Decision on October 18, 2001, *SIAC Construction*, C-19/00, Rec., p. I-7725, pct. 34; CJCE, Decision of the Court on December 12, 2002, *Universale-Bau and others*, C-470/99, Rec., p. I-11617, pct. 93.

² CJEC, Decision on October 2nd, 2003, *Thzssen Stahl/Comisia*, C-194/99 P, Rec., p.I-10821, pct. 31.

³ CJCE, Decision on September 12, 2006, *Eman and Sevinger*, C-300/04, Rec., p. I-8055, pct. 57; Decision on September 11, 2007, *Lindorfer/Council*, C-227/04 P, Rep., p. I-6767, pct. 63.

⁴ CJEC, Decision on December 1st, 1998, *Levez*, C-326/96, Rec., p. I-7835, pct. 51; CJEC, Decision on May 16, 2000, *Preston and others*, C-78/98, Rec., p. I-3201, pct. 60

discrimination to the abuse of power cases that are also rarely admitted. Most of the times or in the jurisprudence, the cases based on discrimination are admitted only in the situations on which the breach of the right to equal treatment was made in a *recruitment procedure of the public servant* (Fromont, 2006).

Although France was more reticent in what concerns the concept of equal treatment and non discrimination defined by the jurisprudence of the Court of Justice of the European Union, we have to mention the fact that we can observe a gradual approach of the French system for the control of the application of these principle by the jurisdiction of the Court, at least in what concerns the manner of approach of the proportionality of the measures, due to the German system, subsequently adopted and all the other national law systems (Iliopoulou, 2007). Therefore, in France, the administrative judge has adopted “the model of equality through generality” asserting that equality has its essence in the generality of the rules “as a guarantee of impartiality”. In Germany the general principle of equal treatment enjoys a special attention due to the jurisprudence of *self limitation* according to which the authority that elaborates the general orientations followed or has to follow a constant practice with which it has to conform its decisions (Fromont, 2006).¹

4. Conclusions

Following the research on the jurisprudence of the Court of Justice of the EU, we can observe that between the two principles analyzed and the other principles of law consecrated by the legislation of the Court there are many points of conversion.

We can easily notice that according to the principle of proportionality, any attempt to limit the application of the principle of equal treatment and non discrimination in the policy regarding the personnel has to be justified objectively and reasonably and has to answer to legitimate objectives of general interest.

In general, within the activity of decision-making, the public servant has to apply an equal treatment without discrimination. He also has to assert objectively the characteristics of the case, so that the persons in an identical case will be treated in similar manner.

The objectivity refers mainly to the activity of adopting decisions, this principle representing one of the grounds of the principle of legality. *Objectivity* is in tight connection to other principles, such as the *principle of equality and non*

¹ In France this conception was assimilated to the centralization lines through which “the equality can be interrupted by an uniform treatment for different situations” and the practice of the State Council confirms this attitude through which the Courts have the capacity, but not the obligation to apply a different treatment to particular cases.

discrimination, proportionality, impartiality etc. In essence, this principle determines an analysis of the measures and grounds for the adoption of the acts by the public servants of the EU, only from the perspective of the relevant factors, by excluding any irrelevant and not grounded¹. In essence, all the principles analysed above have to be reported to the *principle of legality*.

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*** CJEC, Decision on December 1st, 1998, *Levez*, C-326/96, Rec., p. I-7835, pct. 51; CJEC, Decision on May 16, 2000, *Preston and others*, C-78/98, Rec., p. I-3201, pct. 60.

¹ Article 11, article 11a, article 12, article 16 (par.1), article 17 in the *Statute of the European public servants*, article 8 and 9 in the *European Code of Good Administrative Conduct*.